

**UNITED STATES BANKRUPTCY COURT**  
**Western District of Pennsylvania**

**JUDITH KLASWICK FITZGERALD**  
Chief Judge

Suite 5490 U.S. Steel Tower  
600 Grant Street  
Pittsburgh, PA 15219

June 19, 2003

Ms. Kate MacEachern, Manager  
West Publishing  
610 Opperman Drive  
Eagan, MN 55123

RE: *In re Color Tile, Inc.*, 239 B.R. 872 (Bankr.D.Del. 1999)

Dear Ms. MacEachern:

In the West Publishing introduction to the above-captioned opinion that precedes the headnotes in that case, West has summarized the opinion I wrote in the following manner:

Unsecured creditors' committee brought adversary proceeding to set aside, as preference, payments which debtor made to trade creditor within 90- day preference period. Creditor asserted "ordinary course of business" defense, and moved for entry of summary judgment thereon. The Bankruptcy Court, Judith K. Fitzgerald, J., held that evidence that debtor's payments were consistent with parties' longstanding payment practices obviated need for additional evidence as to industry norms.

The summary is incorrect. The opinion does not say that longstanding payment practices obviate the need for additional evidence of industry norms. The opinion analyzes the opinion of the Court of Appeals for the Third Circuit in *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3d Cir. 1994), and quite clearly states that I found:

that evidence of industry standards is not the sole determinative factor in this dispute because the parties had a lengthy and consistent history that encompassed nearly three years of business dealings.

239 B.R. at 876.

Furthermore, I found that the relevant industry was established by the evidence. In that regard I wrote:

This court finds the February 10 affidavit sufficient to establish the relevant industry. *Molded Acoustical Products* requires evidence only of the range of terms that encompass practices similar in a general way to the defendant's.

239 B.R. at 874.

With respect to the parties' practice I said:

In some cases, the far more telling questions are how long the parties transacted business before the preference period and what variations in their relationships occurred during that period...

239 B.R. at 874.

In addition, I quoted Judge Becker in *Molded Acoustical Products* as follows:

... resort to the length of the parties' relationship will remedy many of the defects otherwise apparent in that section [§ 547(c)(2)(C) ]." *Id.* at 224. The unfair advantage of one creditor over another is "reduced if the parties sustained the same relationship for a substantial time frame prior to the debtor's insolvency." *Id.* at 225. Where a trade debt payment is made "according to a longstanding practice between two solvent parties [the payment] most often does not 'prefer' that creditor to the disadvantage of the debtor or other creditors." *Id.* at 225 (footnote omitted).

239 B.R. at 874.

I found that

[t]his case falls squarely within the exception to preference recovery dealt with at length by Judge Becker in *In re Molded Acoustical Products, Inc.* Here, the relationship between the parties was not of recent origin, was not formed only after or shortly before the Debtor sailed into financially troubled seas, and the credit terms need not be subjected to rigorous comparison with credit terms used generally in a relevant industry ...

239 B.R. at 874.

I respectfully request that you change the introductory paragraph to the opinion inasmuch as it mischaracterizes the holding.

If you would like to discuss the matter, I can be reached at 412-644-3541.

Thank you in advance for your prompt attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Judith K. Fitzgerald". The signature is written in dark ink and is positioned above the printed name.

Judith K. Fitzgerald